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No. 91-1814

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MURPHY,

Petitioner,

v.

PHILIP C. MARCUM,
SHEILA F. O'CONNOR,
DEAN RUECKERT,
DANIEL M. BAUGHMAN,

Respondents.

PETITION FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Feres* doctrine prohibit an action by a soldier against his superior officer to recover for injuries arising from retaliation against the soldier for writing to a member of Congress?

a. Whether application of the *Feres* doctrine in a constitutional tort case is limited to considerations based solely upon the aggrieved soldier's active duty status, without reference to the relationship of the activity in question to a military function?

b. Whether Congress may describe an area of activity, entirely unrelated to the active duty status of the aggrieved soldier, within which a member of the

military may act in peril of liability without the protection of the *Feres* doctrine?

c. Whether, with former 10 U.S.C. §1034, Congress proscribed such activities respecting a soldier's free communication with a member of Congress, that if a member of the military should violate the provision, he would act at peril of liability beyond the protection of the *Feres* doctrine?

PARTIES TO THE PROCEEDINGS BELOW

Appellant:	William T. Murphy
Appellees:	Philip C. Marcum
	Sheila F. O'Connor
	Dean Rueckert
	Daniel M. Baughman

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CITATION OF THE UNREPORTED DECISION BELOW

The Court of Appeals for the Fourth Circuit decided this matter in an unreported *per curium* decision, styled *William T. Murphy v. Philip C. Marcum, et al.*, No. 90-2237 (4th Cir. October 18, 1991, amended December 9, 1991).

STATEMENT OF THIS COURT'S JURISDICTION

The Petitioner petitions this Court for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above case, in accordance with 28 U.S.C. §1254 and Rule 10.1.(a) of the Rules of the United States Supreme Court. This Petition seeks a writ of certiorari with respect to the judgment of the Court of Appeals entered on October 18, 1991. This Petition, submitted on January 16, 1992, is therefore filed within the time

limits set forth in Supreme Court Rule 13.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution,

First Amendment

United States Code

Former Title 10, Section 1034 (as published at 10 U.S.C.A. §1034 (1983)

Title 28, Section 2679(b)(2)(A)

STATEMENT OF THE CASE

This case raises an issue concerning the applicability of the doctrine precluding actions brought by members of the military for injuries which are incident to military service, as that doctrine was first formally stated in the case, *Feres v. United States*, 340 U.S. 135 (1950).

The Petitioner is William T. Murphy, a former sergeant in the United States Army. For the period pertinent to this matter, Murphy was stationed at the Aberdeen Proving Grounds in Maryland. On September 5, 1989, Murphy brought a *pro se* action in the United States District Court for the District of Maryland against the Respondents, Philip C. Marcum, Sheila F. O'Connor, Dean Rueckert, and Daniel M. Baughman. The Respondents were all officers in the United States Army who were superior to Murphy.

His action alleged that these officers had defamed him in connection with certain disciplinary actions taken against him in September, 1988. When Murphy later secured counsel to assist him in the action, he amended his

complaint to restate the state law claims he had earlier filed and to add two new claims against the Respondent U.S. Army officers, under the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for certain alleged constitutional torts.

These new constitutional tort claims involved the allegation that Marcum, assisted by the other named officers, had joined together in a scheme to punish Murphy for communicating certain problems at the Aberdeen Proving Grounds to Senator Paul Sarbanes. The new allegations also asserted a scheme to punish Murphy by forcing him out of the Army for his perceived misconduct without affording him due process. Murphy invoked the jurisdiction of the

District Court in accordance with 28 U.S.C. §1332, respecting actions involving citizens of differing states, 28 U.S.C. §1331, respecting actions arising under the Constitution, laws or treaties of the United States, and 28 U.S.C. §1343(a)(4), regarding actions seeking relief under an act of Congress providing for protection of civil rights.

The United States Attorney, responding on behalf of the U.S. Army officers, moved to dismiss the amended complaint on various grounds, including the application of the *Feres* doctrine to this action and these officers. After the issue had been briefed by the parties, but without a hearing on the question, the District Court issued its decision granting the government's motion on October 30, 1990. The sole

basis for the ruling stated by the District Court was its application of the *Feres* doctrine.

Murphy appealed this ruling to the United States Court of Appeals for the Fourth Circuit, in accordance with the jurisdiction conferred by 28 U.S.C. §1291. On October 18, 1991, the Court of Appeals affirmed the ruling of the District Court in a *per curium* opinion.

The facts underlying this case are those alleged in Murphy's amended complaint. For purposes of this review of the ruling of the Court of Appeals, as to the Respondents' Motion to Dismiss, under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the truth of the allegations is not in contest.

In May, 1988, Murphy was a sergeant

in the U. S. Army, stationed at Aberdeen Proving Grounds, Maryland. He was assigned duties in the area of military intelligence. At that time, he had been given the highest of evaluations for his work.

His troubles began in the Spring of 1988 when an upset white female private confided to him that a superior officer, Respondent O'Connor, had telephoned her family on two occasions to warn that she was about to marry a black man. Murphy became concerned about this development, as were a number of other soldiers stationed at Aberdeen. He took it upon himself to draft a statement for several non-commissioned officers to sign for presentation to the post equal opportunity office for further investigation.

Respondent Marcum reacted strongly to this action of Murphy and the other non-commissioned officers. He had the master sergeant intervene and threaten the soldiers with charges of mutiny. He ordered an investigation of both the incident with Respondent O'Connor and the preparation of the equal opportunity grievance.

As a result of that investigation, Respondent Marcum reprimanded Murphy for making false charges of racism against a superior officer. Parenthetically, the investigation did not refute the fact that the Captain had made the telephone calls in question to the family of the private concerning her marriage to a black man. In his written reprimand of Murphy, Respondent Marcum indicated that, in the absence of any further

alleged wrongdoing by Murphy, the matter was settled.

The written reprimand was dated August 3, 1988. Immediately, Murphy went on leave for the balance of August, 1988. While on leave, Murphy committed no further acts colorably in violation of any rule of military conduct. As soon as he returned to base, however, Murphy was confronted with a harsher punishment for this *same* transgression, notwithstanding the representations contained in the reprimand.

These new punishments included (1) Murphy's relief from the assignment for which he had been trained, (2) the suspension of his security clearance, and (3) a threat by Respondent Marcum to impose a bar upon Murphy's reenlistment.

Respondent Marcum also referred Murphy for a mental hygiene consultation in the absence of any unusual behavior by Murphy.

The support for the mental hygiene referral was a report jointly authored by Respondents O'Connor and Baughman, on the basis of their allegations having no basis in fact or grounding as proper opinion. Given these circumstances, Murphy alleged in his amended complaint that the report was the result of concerted action, sometime in mid-August, 1988, by Respondents Marcum, O'Connor, Baughman, and Rueckert, the officer who had conducted the mental hygiene referral.

In mid-August 1988, after the written reprimand, but before imposition of the new punishments on Murphy, the Army

received an letter from the office of Senator Paul Sarbanes regarding a constituent complaint drafted by Murphy. The Senator's letter concerned an Army Inspector General inquiry which Murphy had earlier initiated. The Army responded to this inquiry from Senator Sarbanes by the end of August, 1988. The Army's response to the Senator's letter was dated before imposition of the new punishments on Murphy.

In view of (1) the timing of inquiry to the Army from Senator Sarbanes' office regarding Murphy's concerns about the chain of command for which Respondent Marcum was responsible, (2) the likely communication of the fact of the inquiry to Respondent Marcum in mid-August, 1988, and (3) the remarkable change in his posture toward Murphy from

August 3, 1988 to September, 1988, while Murphy was on leave from the base, Murphy reasonably concluded and properly alleged that the sole motivation for the remarkable change was a desire to penalize him for his communication with his United States Senator.

REASONS FOR ALLOWANCE OF THE WRIT

For several years, this Court and the several Courts of Appeal have considered both the basis for, and the confines of, the protection from suit by one soldier against his superior afforded by case law under the *Feres* doctrine. That analysis has focused upon refining definition of what is "incident to [military] service", *Feres v. United States*, 340 U.S. at 146, within the context of the facts presented by a given case.

See generally Note, *Service Members' Rights Under the* Feres *Doctrine: Rethinking "Incident to Service" Analysis*, 33 Villanova Law Review 174, 188 - 198 (1988). While several principles have emerged from the case-by-case analysis, *id.*, members of this Court have in the past questioned whether this analysis is consistent with the intent of Congress. *See United States v. Johnson*, 481 U.S. 681, 692 (1987)(J. Scalia, dissenting).

In *United States v. Johnson*, *supra*, this Court held that application of *Feres* should be extended to exclude actions on behalf of a serviceman, even against a negligent *civilian* employee, as long as the injuries alleged arose out of activities which were "incident to service." In the absence of any indication that Congress had in fact

embraced any of the rationales which the courts had imputed to it as the basis for the "incident to service" distinction, the dissenters in *United States v. Johnson* questioned whether that distinction should be so extended. 481 U.S. at 694-700.

This case involves a similar question taken one step further. Not only does this case pose the same question as that raised by the dissenters in *United States v. Johnson*, with respect to congressional adoption of the rationales underlying the "incident to service" distinction, it asks whether such judicial *imputation* of a congressional purpose may apply to a case as to which Congress has expressly spoken.

Former Section 1034 of Title 10 of the United States Code, in effect at the

time of the actions complained of in this case, expressly prohibited any person, including a member of the military, from restricting a soldiers' communication with a member of Congress. Murphy brought suit against his commanding officers alleging that they had punished him or retaliated against him solely because they learned that he had written to a United States Senator complaining of their command. His suit was dismissed by the trial court, and that dismissal was affirmed by the Court of Appeals, on the basis of *Feres'* "incident to service" rule. This case asks whether any activity may be deemed by a court to be "incident to service" when Congress has expressly pronounced that no indiviudal, including a member of the military, may

undertake the particular activity out of which the law suit arises. No previous decision of this Court, nor any other decision of a Federal Court of Appeals, has addressed this particular question.

A. The Lower Federal Courts Require Further Clarification By This Court of the "Incident to Service" Qualification for Application of the *Feres* Doctrine.

Writing for the Court, then Chief Justice Burger acknowledged that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute [the Federal Torts Claims Act] as it has been construed in *Feres* and subsequent cases." *United States v. Shearer*, 473 U.S. 52, 57 (1985). In the absence of such "bright-line rules", lower Federal courts have relied upon judicially articulated rationales underlying the

"incident to service" distinction. *See* Note, *Servicemembers' Rights, Etc., supra*, at pp. 188 - 198. The result has been a varied approach by the various Federal circuits.

In this case, the Court of Appeals relied upon a line of authority in the Fourth Circuit defining any activity as "incident to service" in which injury arises from the active duty status of the complaining soldier. In *Kendrick v. United States*, 877 F.2d 1201 (4th Cir. 1989), *cert. dismissed*, 493 U.S. 1065 (1990), the court addressed the medical malpractice claims of an individual on the Army's Temporary Retired List who had been treated in an Army facility. The court affirmed dismissal of the claim, recognizing that Kendrick "remained subject to military

discipline." 877 F.2d at 1204. In *Appelhans v. United States*, 877 F.2d 309 (4th Cir. 1989), the court affirmed the dismissal of a claim brought by a soldier who had been discharged by court martial for injuries occurring while he was on "indefinite excess leave pending review of his sentence." The court concluded that, for purposes of *Feres*, the soldier's status was not distinguishable from active duty status. In *Mickens v. United States*, 760 F.2d 539 (4th Cir. 1985), as well as in *Trerice v. Simmons*, 755 F.2d 1081 (4th Cir. 1985), the court reached similar conclusions, upholding the dismissal of a soldier's allegations of constitutional torts, occurring while the soldier was on active duty status.

In the wake of this Court's decision in *Johnson*, the Sixth Circuit has commented that "in recent years the [Supreme] Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tort-feasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose." *Major v. United States*, 835 F.2d 641, 644 - 645 (6th Cir. 1987), *cert. denied*, 487 U.S. 1218, (1988)(emphasis in original)(footnote omitted). Indeed, the Sixth Circuit

noted that it had recently found *Shearer*controlling in a case involving the beating death of an off-duty serviceman by three of his fellow enlistees, all of whom were free on a weekend pass. *See Satterfield v. United States*, 788 F.2d 395 (6th Cir. 1986).

In *Brown v. United States*, 739 F.2d 362 (8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985), the Eighth Circuit reached the very opposite holding. The case involved the mock-hanging off-post of a black enlisted man by several other enlisted persons, all parties off-post on a weekend pass. The Eighth Circuit sustained the action against the participants in the incident, but affirmed dismissal of the claims against the superior officers for their alleged failure to prevent the incident and to

conduct a proper investigation. In sustaining the action against the enlisted military personnel, the Eighth Circuit applied a two-part test: "(1) whether there is a relevant relationship between the service member's activity and the military service, and (2) whether military discipline will be impeded if the challenged conduct is litigated in a civil action." 739 F.2d at 367.

Although it was decided in 1984, the *Brown* holding has not been overturned in any subsequent reported decision by the Eighth Circuit. Indeed, as recently as July, 1991, the decision was cited as authority in a district court decision. *See Veloz-Gertrudis v. United States*, 768 F.Supp. 38, 42 (E.D.N.Y. 1991).

In *Durant v. Neneman*, 884 F.2d 1350

(10th Cir. 1989), *cert. denied*, 493 U.S. 1024, (1990), the Tenth Circuit relied, in part, on the holding in *Brown*, finding its reasoning "most helpful." 884 F.2d at 1353. *Durant v. Neneman* concerned the claim of two soldiers engaged in a physical training exercise, running on the street on the Fort Riley, Kansas military base. One of the soldiers was killed and the other was injured in an automobile accident involving another soldier who was in uniform driving his private vehicle. Relying upon the reasoning of *Brown*, the court observed as follows:

> While civilian courts have a legitimate concern for protecting the harmony of the military establishment to prevent an erosion of discipline, we do not believe this concern should be extended to claims that arise outside the military function. When a soldier commits an act that would, in civilian life, make him liable to another, he

> should not be allowed to escape responsibility for his act *just because those involved were wearing military uniforms at the time of the act*.

Durant v. Neneman, 884 F.2d at 1354 (emphasis in original).

In this case, the precise issue is whether the activity out of which Murphy's claims arose was "outside the military function", consistent with the reasoning represented by the *Brown* and *Durant* decisions of the Eighth and Tenth Circuits, respectively.

In this regard, Murphy did not ask the court to apply its own notion of what is or is not within "the military function." Rather, he asked the court merely to acknowledge -- what is apparent from the language of 10 U.S.C. §1034 -- that *Congress* had determined that the activity of a soldier in

writing to a member of Congress, as well as that of any person "restrict[ing]" such communication, fell outside the universe of functions which it had conferred upon the military.

In this case, Murphy alleged that he received a punishment for his drafting of the petition to the equal opportunity officer concerning the female private seeking to marry a black man. He received that punishment via a written reprimand on August 3, 1988. He was told that the matter was settled as long as he remained in line. He then went on leave. He did not sue in connection with this punishment.

When he returned to post in September, 1988, he was then confronted with new and expanded punishments for the same act. Murphy did sue with

respect to these expanded punishments. He did not sue because the Respondents were legally prevented from reconsidering the punishment. Rather, he sued because he alleged that the only reason that his punishment was reconsidered and expanded was to retaliate against him for writing to Senator Sarbanes about other problems regarding the conduct of the command at the Aberdeen Proving Grounds. Assuming the truth of his allegations, the retaliation against him is an after-the-fact restriction of the underlying communication with Senator Sarbanes, which communication, it is alleged, provoked the punishment or retaliation.

The Fourth Circuit in this case looked no further than to the status of

Murphy as an active duty member of the military in determining that the activity complained of was "incident to service" and therefore subject to the bar of *Feres*. *Murphy v. Marcum*, No. 90-2237 (4th Cir. October 18, 1991), at p. 4. The reasoning of the Eighth and Tenth Circuit cases, however, compels more extensive inquiry regarding the relationship of the activity complained of and "the military function." *See Durant v. Neneman*, 884 F.2d at 1354. The lower federal courts, accordingly, require the guidance of this Court to resolve this apparent conflict in approach to application of the *Feres* doctrine reflected by the cited cases. Moreover, this case, involving allegations of violation of an apparent congressional circumscription

of activities permitted the military, provides an appropriate vehicle for the Court to address this question.

B. Review By this Court is Warranted Because of the Fundamental Constitutional Interests Which Have Been Affected By Prior Rulings and Likely Would Be Affected In the Future By the Present Uncertainty Regarding Application of the *Feres* Doctrine in Cases Involving Constitutional Torts.

Under prior *Feres* rulings, the government and military personnel have been held to be immune from tort claims by soldiers for a host of harms affecting fundamental rights. These cases have included a case by black servicemen claiming racial discrimination in the rendering of punishments and duty assignments, *see Chappell v. Wallace*, 462 U.S. 296 (1983); a claim of sexual assault by a

soldier against her superior officer, *see Stubbs v. United States*, 744 F.2d 58 (11th Cir. 1984); the apparent killing of an army intelligence agent who had announced a decision to write his memoirs, *see Sigler v. Levan*, 485 F.Supp. 185 (D. Md. 1980); and a claim by a soldiers subjected to experimental injections of L.S.D. *See United States v. Stanley*, 483 U.S. 669, 107 S.Ct. 3054 (1987). *See generally* Schwartz, *Making Intramilitary Tort Law More Civil: A Proposed Reform of the* Feres *Doctrine*, 95 Yale Law Journal 992 (1986).

In *Stanley v. United States*, *supra*, several members of this Court dissented from the holding of the majority which rendered actions which no civil society should promote nevertheless beyond the power of the civil courts to redress.

In her separate opinion, in part both concurring and dissenting, Justice O'Connor made the following comments:

> No judicially crafted rule should insulate from liability the involuntary and unknowing human experimentation alleged to have occurred in this case. Indeed, as Justice BRENNAN observes, the United States military played an instrumental role in the criminal prosecution of Nazi officials who experimented with human subjects during the Second World War ... .
>
> * * *
>
> If this principle [of the Nuernberg Military Tribunals against subjecting human subjects to involuntary experimentation] is violated the very least that society can do is to see that the victims are compensated, as best they can be by the perpetrators.

United States v. Stanley, 483 U.S. at 708-710 (O'Connor, J., concurring in part and dissenting in part).

This case does not involve actions, like those in *Stanley*, which are so egregious that no civil society should

tolerate them. However, the actions involved here happen to be such actions which this particular society happens not to tolerate. Clearly, the First Amendment to the Constitution protects the right of the people to petition the government. Certainly, §1034 protected this right, as exercised by a member of the military, by prohibiting any restriction of a communication by a soldier to a member of Congress, absent certain considerations not relevant in this case.

In addition, the Federal Torts Claims Act ("FTCA") would permit a civilian federal employee in Murphy's position to have recourse personally against the transgressor had the employee been disciplined by his boss for writing to a member of Congress. The legislative

history underlying the 1988 Amendments to the FTCA make clear that where a plaintiff seeks individual relief against a federal employee for violation of his constitutional rights, the FTCA "would not effect the ability of [such] victims ... to seek personal redress from [such] federal employees ... ." House Report No. 100-700, 7 U.S. Code, Congressional and Administrative News 5950 (1988). *See* 28 U.S.C. § 2679(b)(2)(A). Thus, in a *Bivens*-type action against a federal employee for personal relief, Congress has chosen not to apply the FTCA to protect from personal liability such a constitutional tort-feasor.

The question which this case raises is whether, in the context of a *Bivens*-type action brought by one member

of the military against another, Congress intended to erect such a barrier of immunity to protect the constitutional tort-feasor simply because of the victim's military status. Murphy argued in the Court of Appeals that, in view of the clear language of §1034, applicable at the time in question, Congress had chosen not to erect such a barrier protecting a tort-feasor violating this provision.

In *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court held that a violation of the Fourth Amendment by federal officers could give rise to an action for money damages against the offending officers. The Court however suggested, in dictum, that such an action may not be appropriate "when

there are 'special factors counselling hesitation in the absence of affirmative action by Congress', [403 U.S. at 396], or where there is an 'explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in view of Congress.'[403 U.S. at 397]." *United States v. Stanley*, 483 U.S. at 678, *quoting*, *Bivens*, *supra*. The *Stanley* court held that these "special factors counselling hesitation", expressed in *Bivens* with regard to the bringing of constitutional tort actions against federal officers, were as extensive as the exception to liability under the Federal Tort Claims Act established by

Feres and *United States v. Johnson, supra*. The issue presented here is whether the circumstances of Murphy's relationship with the military, especially given the nature of his allegations and the application of §1034, represent such a "special factor counselling hesitation" in judicially recognizing his claim under *Bivens* for redress of a constitutional tort.

Historically, *Bivens*-type claims which involve the military and some application of the *Feres* doctrine have raised such issues touching upon the fundamental values of this society as are not typically raised in routine personal injury litigation. Moreover, in the context of actions against federal civilian personnel, Congress has already drawn a distinction in the

treatment to be accorded traditional tort claims against government civilian personnel and constitutional tort claims. In the former instance, Congress has erected a bar to personal liability. In the latter instance, Congress has taken care not to disturb available judicial remedies against the tort-feasor.

It is appropriate with this case for this Court now to consider whether or not it should consider such a distinction in the context of intramilitary *Bivens*-type actions where there is indication that the challenged activity is duly beyond any congressional definition of military function. Such consideration is further warranted in this context given the reading drawn by the Sixth Circuit that,

under the holdings of this Court, *Feres* bars any relief for any tort, including constitutional torts, as long as the victim of the constitutional violation was on active duty status. *See Major v. United States*, 835 F.2d at 644 - 645.

The Petitioner asks that this Court grant a writ of certiorari to determine for the lower federal courts when, if at all, Congress may, by its own enactments, counter and undermine any judicial imputation of its intent to confer upon constitutional tort-feasors in the military an immunity from suit by the soldiers subject to injury.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari to the

Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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APPENDIX

U.S. Constitution, Amendment I

Former 10 U.S.C. §1034, as published at 10 U.S.C.A. §1034 (1983)

28 U.S.C. §2679(b)(2)(A)

Unpublished Opinion, *Murphy v. Marcum*, No. 90-2237 (4th Cir. October 18, 1991, as amended December 9, 1991)

Unpublished Opinion, *Murphy v. Marcum*, Civil Action No. JFM-89-2528 (D. Md. October 30, 1990)

Amended Complaint, *Murphy v. Marcum*, Civil Action No. JFM-89-2528

APPENDIX

U.S. Constitution, Amendment I

AMENDMENT I - FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Former 10 U.S.C. §1034, as published at 10 U.S.C.A. §1034 (1983)

§1034. Communicating with a member of Congress

No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

28 U.S.C. §2679(b)

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government -

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM T. MURPHY,
Plaintiff-Appellant,

v. No. 90-2237

PHILIP C. MARCUM, SHEILA F. O'CONNOR; DEAN RUECKERT; DANIEL M. BAUGHMAN,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore,
J. Frederick Motz, District Judge.
(CA-89-2528-JFM)

Argued: May 8, 1991

Decided: October 18, 1991

Amended by order filed December 9, 1991

Before ERVIN, Chief Judge, HALL, Circuit Judge, and KELLAM, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: John H. Morris, Jr., VENABLE, BAETJER & HOWARD, Baltimore, Maryland, for Appellant. Major Raymond J. Jennings, Jr., Office of the Judge Advocate General, DEPARTMENT OF THE ARMY, Washington, D.C., for Appellee. ON BRIEF: Lt. Col. Mark A. Steinbeck, Office of the Judge Advocate General, DEPARTMENT OF THE ARMY, Washington, D.C.; Breckinridge L. Willcox, United States Attorney, Carmina S. Hughes, Assistant United States Attorney, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

This appeal arises from the action of the district court in dismissing the complaint of appellant, William T. Murphy, a sergeant in the United States Army, filed against four of his superior officers. Appellant's complaint asserts

a state law claim of defamation and two constitutional tort claims under the rationale of Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The district court determined that the acts complained of were "incident to military service" and barred by the Feres doctrine. Agreeing with the district court, we affirm.

At the time of the happening of the events in question, Sergeant William T. Murphy (Murphy) was assigned to the 11th Military Intelligence Company, Army Intelligence and Security Command, Aberdeen Proving Ground, Maryland. As a part of his duties, he participated in the collection and dissemination of combat strategy and military intelligence. He held a top secret security clearance. Captain Sheila F.

O'Connor was, until about August 16, 1988, his commanding officer. She was, on that date last mentioned, succeeded by Captain Daniel M. Baughman. Major Dean Rueckert was Chief of Mental Health Services at Aberdeen and Lt. Col. Philip C. Marcum was the Group Commander. The amended complaint filed herein alleged that about May 1988, Murphy learned Captain O'Connor had telephoned the mother of Private Unkenholt (a white female) concerning Unkenholt's plans to marry an African-American man. Unkenholt showed Murphy a statement from her mother relative to the telephone call setting out O'Connor's reservations about the interracial marriage. Thereupon Murphy drafted a petition condemning O'Connor's telephone call which he planned to circulate among the troops and submit to the Equal

Opportunities Officer. Some forty soldiers committed themselves to sign the petition. Upon learning of the proposed petition, Group Sergeant Major Chester Leeth called a meeting of the non-commissioned officers and threatened to bring mutiny charges against anyone who signed the petition. Shortly thereafter, Lt. Col. Marcum initiated the investigation. Following completion of the investigation, on or about April 3, 1988, Marcum reprimanded Murphy for making false charges of racism against O'Connor. Lt. Col. Marcum stated that absent further problems, the reprimand would conclude the matter. Thereafter, about August 16th, Murphy went on leave. Sometime before August, Murphy had initiated an Inspector General investigation and an inquiry by Senator Sarbanes regarding a separate and

unrelated matter in Lt. Col. Marcum's chain of command. While Murphy was on leave, Marcum learned of these inquiries and assisted the Army in preparing its response. Marcum was irritated by Murphy's efforts to petition authorities outside of his command and resolved to kick Murphy out of the Army.

When Murphy returned to duty on September 6, he learned Marcum had imposed severe sanctions upon him. On that day, Marcum relieved Murphy from his assignment, suspended his security clearance and halted all favorable action on Murphy. He advised Murphy he was recommending revocation of Murphy's security clearance and would bar him from re-enlisting. The complaint further alleges that Marcum had O'Connor and Baughman draft a false document stating that Murphy needed a psychiatric

examination; that following a short interview, Rueckert reached an unfounded conclusion that Murphy suffered from "passive aggressive traits," and sent this report to Army authorities for consideration on Murphy's security clearance; that Marcum then inserted false and damaging reports in Murphy's file, and arranged for Murphy to be transferred to Korea; that when Murphy inquired about the status of his security clearance, he was given the choice of going to Korea, without resolution of his security clearance, or resigning; and that rather than stay in the Army without his security clearance, he resigned. Plaintiff seeks compensatory and punitive damages.

Defendants move to substitute the United States as the party defendant, and to dismiss the complaint for failure

to state a cause of action. The basis of the motion was the assertion that the claim for defamation was expressly exceptive from the FTCA, and all such claims were barred as incident to plaintiff's military service.

Accepting as true allegations of the amended complaint for the purpose of defendant's motion, the court substituted the United States as the party defendant, and granted the motion to dismiss, holding that neither the claim for defamation or the alleged constitutional tort claims were legally cognizable in this action. The allegations make clear and the trial court found that Murphy was on active duty at the time of the commission of such acts.

As determined in Feres v. United States, 340 U.S. 135, 146 (1950), the

United States is not liable under the Federal Tort Claims Act or for constitutional tort for injury to service personnel where the injuries arise out of or are in the course of activity incident to service. This principle has been restated and affirmed numerous times by the Supreme Court. Chappell v. Wallace, 462 U.S. 296, 305 (1983); United States v. Johnson, 481 U.S. 681, 686 (1987); United States v. Stanley, 483 U.S. 669, 683-684 (1980), and the Fourth Circuit, see Kendrick v. United States, 877 F.2d 1201 (4th Cir. 1989), cert. dismissed, 110 S. Ct. 1104 (1990); Appelhans v. United States, 877 F.2d 309 (4th Cir. 1989); Micken v. United States, 700 F.2d 539, 540 (4th Cir. 1985); Trerice v. Summons, 755 F.2d 1081, 1082 (4th Cir. 1985). In Chappell, the Court dealt with a Bivens

type claim of a service person against his superior, saying "[W]e hold that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." 462 U.S. at 305. The "Feres doctrine has been applied consistently to bar all suits on behalf of service members against the government based upon service-related injuries." Johnson, 481 U.S. at 687-688. See also Stanley, 483 U.S. at 683-684; Trerice; Mickens; Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986).

Murphy further asserts that his claim for First Amendment violations is not prohibited by the Feres doctrine because Congress has by 10 U.S.C. §1034 provided that no person may restrict any member of the armed forces from communicating with a member of Congress, unless the

communication is unlawful or violates a regulation necessary to the security of the United States.

He therefore contends that the trial court's analysis of the Feres doctrine is incomplete and that the trial court's holding failed to address the constitutional tort of "abridgement of Murphy's right under the First Amendment to petition his government," (Brief of Appellant, p. 7), and that such right is protected by federal law. He further contends that the action of his superior officers interfered with his right to communicate with a member of Congress as provided for in §1034 and that their action violated his constitutional right of free speech. Section 1034 provides that a service person may write a member of Congress without sending the communication through official

channels. This right was not interfered with. He wrote his letter without sending it through official channels. But that statute does not protect the circulation of a collective petition within a military base. It has no application here. See Brown v. Glines, 444 U.S. 348, 361 (1980).

Murphy here seeks damages for the alleged denial of his constitutional rights, but "Congress, the constitutionally authorized source of authority over the military system of justice, has not provided a damages remedy for claims by military personnel whose constitutional rights have been violated by superior officers." Chappell, 462 U.S. at 304.

The special nature of military life -- the need for decisive action by officers and disciplined response by

enlisted personnel -- "would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." Chappell, 462 U.S. at 304. In Bois, the plaintiff sought relief for alleged discrimination, declaratory and equitable relief based on alleged violation of due process and equal protection, conspiracy to deprive her of her Civil Rights in violation of 42 U.S.C. §1985(3), and statutory and common law claims against her superior in his individual capacity. In upholding the trial court's dismissal, the court point out that:

> Permitting Bois to attempt to prove that she was victimized by discrimination would necessarily require a civilian court to examine in detail the personnel and other command decisions which Bois claims were discriminatory. Such scrutiny would also likely require testimony by Army personnel about command decisions by Bois's superiors.

801 F.2d at 467-468.

The facts of this case as alleged by the plaintiff bring it clearly within the *Feres* doctrine. The judgment of the trial court is therefore affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM T. MURPHY *

v. * Civ. No. JFM-89-2528

PHILLIP C. MARCUM, et al. *

*

* * * * * * * * * *

MEMORANDUM

Plaintiff William T. Murphy ("Murphy"), a former Army sergeant, has sued Defendant Philip C. Marcum ("Marcum"), an Army Lieutenant Colonel; Defendant Sheila F. O'Connor ("O'Connor"), an Army Captain; Defendant Dean Rueckert ("Rueckert"), an Army Major; and Defendant Daniel M. Baughman ("Baughman", an Army Captain. In his Amended Complaint, Murphy alleges that the defendants, acting individually and conspiring together, violated his Fifth and First Amendment rights. In

addition, he alleges that each defendant defamed him.

The defendants have moved to substitute the United States as party defendant and to dismiss all of Murphy's claims.

I.

Because the case is presently before me on a motion to dismiss, I must assume that all of the allegation made in the Amended Complaint are true. These allegations are as follows.

In May 1988 Murphy, then an Army sergeant, was stationed at Aberdeen Proving Grounds. He worked in the area of military intelligence and possessed a top secret security clearance. Throughout his six-year tenure in the Army, he had received "the highest of evaluations." Amended Complaint Par. 10. Until mid-August 1988,

O'Connor was Murphy's commander and Marcum his Group Commander. Amended Complaint Pars. 2-3.

On or about May 13, 1988, Murphy learned that O'Connor had telephoned the mother of Private Melissa Unkenholt regarding Unkenholt's plans to marry an African-American man. Unkenholt, who is white, showed Murphy a notarized statement from her mother attesting that O'Connor had called the Unkenholt home and had expressed reservations about the interracial marriage. Amended Complaint Par. 11.

Upset by this news, Murphy drafted a petition condemning O'Connor's telephone call. He planned to circulate the petition among the troops and submit it to the Equal Opportunity office. Amended Complaint Par. 12. Roughly forth soldiers orally committed

themselves to signing the petition. On May 20, the day the petition was to be signed, Group Sergeant Major Chester Leeth called a meeting of the company's noncommissioned officers and threatened to brink mutiny charges against anyone who signed the petition. Amended Complaint Par. 13.

Shortly thereafter, Marcum initiated an investigation of the entire incident. On or about August 3, 1988, after the investigation was completed, Marcum reprimanded Murphy for making false charges of racism against O'Connor. Marcum stated that absent further problems, the reprimand would conclude the matter. Following the reprimand, Murphy went on a 30-day leave. Amended Complaint Pars. 14-16. On August 16, while Murphy was on leave, Baughman relieved O'Connor as Murphy's

commanding officer. Amended Complaint Par. 5.

Sometime before August 1988, Murphy had initiated an Inspector General investigation and an inquiry by Senator Sarbanes regarding a separate, unrelated matter in Marcum's chain of command. While Murphy was on leave during August 1988, Marcum learned of these inquiries and helped the Army prepare its response. Amended Complaint Par. 17. Marcum was irritated by Murphy's efforts to petition authorities outside Marcum's chain of command, and resolved to kick Murphy out of the Army in retaliation. Amended Complaint Par. 18.

When Murphy returned to duty on September 6, he found that Marcum had imposed severe sanctions despite his earlier statement that the August 3 reprimand would end the petition

controversy. On September 6 Marcum relieved Murphy from his current assignment, suspended his security clearance, and halted all favorable actions on Murphy. In addition, Marcum told Murphy that he was recommending revocation of Murphy's security clearance and would bar Murphy from re-enlisting. Amended Complaint Par. 19. Furthermore, Marcum had O'Connor and Baughman draft a false document stating that Murphy needed a psychiatric examination. After a short interview, Rueckert reached the unfounded conclusion that Murphy suffered from "passive aggressive traits." Rueckert sent his medical report to Army authorities for consideration in connection with the suspension of Murphy's security clearance. Amended Complaint par. 20-21.

Marcum then inserted false and damaging personnel reports in Murphy's file, and arranged for Murphy to be transferred to Korea. When Murphy inquired about the status of his security clearance, he was given the choice between going to Korea without resolution of his clearance or resigning. Rather than stay in the Army without his security clearance, Murphy resigned. Amended Complaint Pars. 22-24.

II.

If what plaintiff alleges is true, he has been the victim of unconscionable conduct. However, neither his defamation claim nor his constitutional tort claims are legally cognizable in this action.

In Feres v. United States, 340 U.S. 135, 146 (1950), the Supreme Court specifically held that a member of the

Armed Forces has no claim under the Federal Tort Claims Act for injuries suffered "in the course of activity incident to service." The Fourth Circuit has held that the Feres doctrine extends beyond the FTCA and "is a bar to any common law tort claims." Trerice v. Summons, 755 F.2d 1081, 1084 (4th Cir. 1985); accord Deckinger v. Castro-Reyes, 689 F. Supp. 531 (D. Md. 1988). In United States v. Stanley, 483 U.S. 669, 684 (1987), the Supreme Court quoting from Feres, likewise held that "no Bivens [constitutional tort] remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'"

In light of these authorities, the sole question presented here is whether the injuries which Murphy claims were "incident to military service."

In Hass ex rel. United States v. United States, 518 F.2d 1138, 1140 (4th Cir. 1987), the Fourth Circuit adopted a "relatively mechanical" test for resolving this question: any injury suffered while the plaintiff was "on active duty and not on furlough" is incident to military service. Accord Mariano v. United States, 605 F.2d 721, 722 (4th Cir. 1979). Although this test is, perhaps, too blunt a tool of analysis to use in every case, see Brown v. United States, 739 F.2d 362 (8th Cir. 1984), cert. denied 473 U.S. 904 (1985), it seems eminently reasonable to posit that presumptively injuries suffered while the plaintiff is on active duty an not on furlough are not actionable. Murphy has presented no argument which would rebut this presumption.

Moreover, if the "incident to military service" role is considered in relation to its purpose, the flaw in Murphy's claim is exposed. The Supreme Court has noted that the holding in Feres (and derivately Stanley) appears to be best explained by the necessity of preserving military discipline. United States v. Shearer, 473 U.S. 52, 57 (1985) (quoting United States v. Muniz, 374 U.S. 150, 162 (1963)). In so indicating, the Court identified as "important" considerations in determining whether a plaintiff's injuries were incident to military service "whether the suit requires the civilian court to second-guess military decision" and "whether the suit might impair essential military discipline." Id. at 57. Here, resolution of Murphy's claims on the merits necessarily would

require this Court to "second-guess military decisions" regarding discipline. The very gist of Murphy's complaint is that he was wrongfully disciplined. Like the plaintiff in Shearer, Murphy seeks to call into question "basic choices about the discipline, supervision, and control of a serviceman," namely himself. See id. at 58. Further, to permit his suit to be maintained would be to imply that aggrieved solders can flock to the courthouse, thereby "impair[ing] essential military discipline." Id. at 57.

The facts of Brown v. United States, 739 F.2d 362 (8th Cir. 1984), upon which Murphy heavily relies, are so unusual as to render its holding sui generis. There, a black national guardsman fell into a deep depression and attempted to

commit suicide after he was the victim of a "mock" lynching at a Memorial Day picnic with members of his unit. In ruling that a suit under the FTCA was maintainable the Eighth Circuit found that the mock lynching "served no conceivable or remote military purpose." 739 F.2d at 368. In the present case, in contrast, the disciplining of an insubordinate soldier self-evidently has a "military purpose," and resolution of Murphy's claims necessarily would require this Court to second-guess the military authorities as to whether legitimate grounds existed for the discipline meted out to him.

Murphy also argues that the defendants were acting outside their authority in disciplining him and that therefore his injuries cannot be attributed to his military service.

This precise argument, however, was rejected by the Supreme Court in United States v. Stanley when it refused to permit Bivens actions based solely upon an allegation that the officer's conduct was "so egregious that no responsible officer would feel exposed to suit in the performance of his duties." 483 U.S. at 681.

For these reasons defendant's motion to dismiss will be granted. A separate order to that effect is being entered herewith.

Date:_____

_____
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM T. MURPHY *

v. * Civ. No. JFM-89-2528

PHILLIP C. MARCUM, et al. *

* * * * * * * * * *

AMENDED COMPLAINT

Plaintiff, William T. Murphy, by and through the undersigned attorney, hereby amends his initial complaint to sue Defendants Philip C. Marcum, Sheila F. O'Connor, Dean Rueckert, and Daniel M. Baughman. In support of this amended action, the Plaintiff states as follows:

The Parties

1. Plaintiff, William T. Murphy, is a former sergeant in the United States Army. At all times relevant to this action, he was a member of the military stationed at the Aberdeen Proving

Grounds, in Aberdeen, Maryland. Since he left the Army in the spring of 1989, he has maintained his residence in Havre de Grace, Maryland, and he is a citizen of the State of Maryland.

2. Defendant Philip C. Marcum is a Lieutenant Colonel in the United States Army. He currently resides in Cambridge, Massachusetts, and he maintains a residence in the Commonwealth of Virginia. He so resided at the time the initial complaint in this action was filed. At all times relevant to this action, Defendant Marcum was Plaintiff's Group Commander at the Aberdeen Proving Grounds. Upon information and belief, the Plaintiff alleges that Defendant Marcum is a citizen of a state other than the State of Maryland.

3. Defendant Sheila F. O'Connor is a

Captain in the United States Army. At all times relevant to this action on or before August 16, 1988, Defendant O'Connor was the Plaintiff's commanding officer. Upon information and belief, the Plaintiff alleges that Defendant O'Connor is a resident of the District of Columbia, and she is currently stationed at a United States Army facility in South Korea. Upon information and belief, the Plaintiff alleges that Defendant O'Connor is a citizen of a state of federal district other than the State of Maryland.

4. Defendant Dean Rueckert is a Major in the United States Army. At all times relevant to this action, Defendant Rueckert served as the Chief of Mental Health Services at the Aberdeen Proving Grounds. Upon information and belief, the Plaintiff alleges that Defendant

Rueckert is a citizen of a state other than the State of Maryland.

5. Defendant Daniel F. Baughman is a Captain in the United States Army. At all times relevant to this action, after August 16, 1988, Defendant Baughman served as the Plaintiff's commanding officer. Upon information and belief, the Plaintiff alleges that Defendant Baughman is a citizen of a state other than the State of Maryland.

Jurisdiction and Venue

6. This action is brought in accordance with 28 U.S.C. Section 1332, in that the parties are citizens of different states and the matter in controversy exceeds the value of $50,000.

7. This action is brought in accordance with 28 U.S.C. Section 1331, in that it in part arises under the

Constitution, laws, or treaties of the United States.

8. This action is brought in accordance with 28 U.S.C. Section 1343(a)(4), in that it in part seeks relief under an Act of Congress providing for the protection of civil rights.

9. The illegal and tortious acts alleged herein both took place and caused injury within the State of Maryland. Defendants Baughman and Rueckert currently remain stationed at a United States Army facility in the State of Maryland. All defendants engaged in the alleged tortious conduct while each was present within the State of Maryland. Venue as to all defendants therefore is based upon 28 U.S.C. Section 1391.

Factual Background

10. In May, 1988, the Plaintiff was a sergeant in the United States Army. He had been in the Army for 6 years. He was stationed at the Aberdeen Proving Grounds, working in the area of military intelligence. Consistent with his military assignment, he possessed a top secret clearance which enabled him to review the classified materials required for his job. He was regarded as a fine and capable soldier, and he had consistently received the highest of evaluations prior to this date.

11. On or about May 13, 1988, Private Melissa Unkenholt informed the Plaintiff that Defendant O'Connor had twice telephoned her family to tell them that their daughter, who was white, was about to marry a black man. Private Unkenholt was upset by what she viewed as

inappropriate and questionable intrusions into her personal life by Defendant O'Connor over her planned marriage to a black man. Private Unkenholt showed to the Plaintiff a notarized statement from her mother attesting to the receipt of the telephone calls from Defendant O'Connor.

12. A number of the soldiers who were aware of the call by Defendant O'Connor were upset by it and viewed the situation as one that should be brought to the attention of the Equal Opportunity Office on the post. Plaintiff drew up a short statement for circulation to several soldiers for their signature and subsequent presentation to the Equal Opportunity Office.

13. On or about May 20, 1988, the statement was to be signed by

approximately forty soldiers who had orally committed themselves to signing it. On the morning of May 20, 1988, prior to any consideration of signing the statement, a meeting of the Plaintiff's company's non-commissioned officers was called by Group Sergeant Major Chester Leeth. Sergeant Major Leeth addressed all assembled non-commissioned officers and announced that he regarded as mutinous the equal opportunity grievance concerning Defendant O'Connor's calling of Private Unkenholt's family. He noted that any complaint concerning the situation must be made individually, and he stated that, if he saw any signature on the equal opportunity grievance, he would make sure that charges of mutiny would be brought against the soldier.

14. Shortly thereafter, Defendant Marcum initiated an investigation into the drafting of the equal opportunity grievance regarding Defendant O'Connor. During the course of this investigation, a number of soldiers, including the Plaintiff, were approached for questioning. Plaintiff exercised his right to decline answering questions regarding his own involvement in the incident.

15. As a result of the investigation, the Plaintiff received a reprimand from Defendant Marcum on or about August 3, 1988 for making false charges of racism against Defendant O'Connor. In giving the reprimand, Defendant Marcum indicated that absent any further problem involving the Plaintiff, that the reprimand would end the matter and any other discipline of the Plaintiff.

16. Following receipt of the reprimand on August 3, 1988, the Plaintiff went on leave for 30 days, and, with that authority, was absent from the Aberdeen Proving Grounds for the balance of August, 1988.

17. Prior to the imposition of the reprimand of August 3, 1988, the Plaintiff had initiated both an inspector general investigation and a congressional inquiry concerning an earlier complaint regarding Defendant Marcum and his chain in command. Upon information and belief, between August 17, 1988 and August 30, 1988, Defendant Marcum was advised by the Department of the Army of these inquiries, and he further was consulted by the Army in preparation of the Army's response to a letter from the office of Senator Paul Sarbanes.

18. Upon information and belief, the Plaintiff alleges that sometime in August, 1988, Defendant Marcum determined to effect removal of the Plaintiff from the United States Army in retaliation for the trouble which Defendant Marcum perceived that the Defendant had caused by his efforts to petition the Army Inspector General, elected representatives, and the Equal Opportunity Office to redress his grievances outside of a chain of command which included Defendant Marcum. Rather than proceed with a court martial of the Plaintiff which would have achieved his desired result and afforded the Plaintiff due process protections, Defendant Marcum proceeded surreptitiously, outside of the established process, to secure the removal of the Plaintiff from his

position with the United States Army, without affording him any process at all.

19. On September 6, 1988, in the absence of any further allegation of misconduct by the Plaintiff and contrary to the representations that he had made in the reprimand, Defendant Marcum imposed additional and more severe disciplinary actions upon the Plaintiff. These more severe restrictions included a relief for cause evaluation report which relieved the Plaintiff from his current assignment, a suspension of the Plaintiff's security clearance, the halting of all favorable actions on the Plaintiff. Defendant Marcum also advised the Plaintiff that he was recommending revocation of the Plaintiff's security clearance and that he would impose a bar to reenlistment on the Plaintiff.

20. Defendant Marcum also secured the referral of the Plaintiff for a mental hygiene consultation as support post hoc for the ordered suspension of the security clearance. In consultation with Defendants O'Connor and Baughman, Marcum obtained from the Plaintiff's superior officers a report showing him to be in need of a psychiatric examination. Defendants Marcum, O'Connor and Baughman knew this report was false, and it was made solely to impair the Plaintiff's Army career in retaliation for his complaints regarding the actions of O'Connor and Marcum to the Inspector General and to members of Congress.

21. The Plaintiff was examined by Defendant Rueckert pursuant to the order of Defendant Marcum. ON the basis of a short interview giving no indication of

any pathology, Defendant Rueckert offered an unfounded diagnosis of the Plaintiff as having an "[o]ccupational [p]roblem with passive aggressive traits." This recommendation was forwarded for consideration by the Army in connection with Defendant Marcum's suspension of the Plaintiff's security clearance.

22. Defendant Marcum had advised Sergeant Major Leeth that he wanted the Plaintiff out of the Aberdeen Proving Grounds. Defendant Marcum set about a scheme to subject the Plaintiff to the loss of his Army career without affording him the procedural protections provided by the Army regulations. Accordingly, Defendant Marcum set about placing in the Plaintiff's personnel record false reports and evaluations of such a serious nature as to be career

ending. He proceeded, in the absence of any evidentiary support, to deprive Plaintiff of a security clearance when his only Army training was in the field of military intelligence. Defendant Marcum then ordered Sergeant Major Leeth to secure transfer orders for the Plaintiff to Korea at a time when the Plaintiff's security clearance was in doubt.

23. In the spring of 1989, the Plaintiff was presented with orders requiring him to report to Korea. On May 31, 1989, when the Plaintiff questioned the uncertain status of his security clearance, he was given the choice of going to Korea without official written resolution of the clearance or signing a Declination of Continued Service. As of that date, July 8, 1989, and August 25, 1989, the

Plaintiff's record contained no written evidence that his security clearance had ever been reinstated.

24. Rather than commit to Army service in Korea without written evidence of the reinstatement of his security clearance, which the Army was neither willing nor able to provide, the Plaintiff signed the Declination of Continued Service and ended his Army career.

COUNT I
[Constitutional Torts]

25. The Plaintiff realleges, as if they had been made in full herein, the allegations set forth in Paragraphs Nos. 1 through 24, inclusive.

26. Defendants Marcum, O'Connor, Baughman, and Rueckert individually engaged in actions intended by them to deprive the Plaintiff of due process of

law so as to punish him or to force his resignation from the United States Army in violation of his rights under the Fifth Amendment to the United States Constitution.

27. Defendants Marcum, O'Connor, Baughman, and Rueckert individually engaged in actions intended to punish the Plaintiff and retaliate against him for petitioning to his elected representatives, in violation of the Plaintiff's rights under the First Amendment to the United States Constitution.

28. Defendants Marcum, O'Connor, Baughman, and Rueckert acted in concert by conspiring together to deprive the Plaintiff of his rights under the Fifth and the First Amendments to the United States Constitution.

29. As a result of their wrongful action, the Plaintiff has been subjected to the aforementioned deprivations and further he has been forced unlawfully to end his military career.

WHEREFORE, the Plaintiff respectfully asks that this Court enter judgment in his favor against Defendants Marcum, O'Connor, Baughman, and Rueckert, individually and collectively, in the amount of $100,000, in compensatory damages, $1,000,000 in punitive damages, together with interest and costs.

COUNT II

(Defamation as to Defendant Marcum)

30. The Plaintiff realleges, as if they had been made in full herein, the allegations set forth in Paragraphs Nos. 1 through 24, inclusive.

31. On or about September 1, 1988, Defendant Marcum drafted a statement

that ordered Plaintiff relieved of his duty position as an intelligence sergeant in the Army. In that document, Defendant Marcum falsely stated that the Plaintiff lacked integrity and loyalty to his chain of command, that he was a liar, that he no longer was capable of fulfilling the obligation of a non-commissioner officer, all of which was false and defamatory.

32. Defendant Marcum's written statement was communicated to Plaintiff's superiors, Carl Lambert, Thomas Makin and Daniel Baughman, and placed in Plaintiff's Army personnel file where it is available to other third persons.

33. Defendant Marcum knew at the time that he drafted the statement that it was false and defamatory.

34. Defendant Marcum's statement was designed to and did injure Plaintiff Murphy and impaired him in his career with the Army.

35. Plaintiff discovered that these defamatory statements had been made on or about September 6, 1988, when he was shown them and asked to sign the NCO Evaluation Report to which they were attached.

WHEREFORE, Plaintiff prays that the Court:

a. Enter judgment against Defendant for $100,000 in compensatory damages;

b. Enter judgment against Defendant for $1,000,000 in punitive damages; and

c. Award Plaintiff the costs of this action and such other relief as Plaintiff's cause requires.

COUNT III

[Defamation as to Defendant O'Connor]

36. The Plaintiff realleges, as if they had been made in full herein, the allegations set forth in Paragraphs Nos. 1 through 24, inclusive.

37. On or before September 6, 1988, Defendant O'Connor authored a statement as part of a Request for Mental Hygiene Consultation for Plaintiff. In that statement, O'Connor falsely stated that Plaintiff needed a psychiatric evaluation and further stated that Plaintiff did not appear capable to accept training or performing duty; that Plaintiff was guilty of chronic complaining, refusal to put forth effort, encouraged insubordination in others, resented discipline, had strange ideas; that Plaintiff was consumed with feelings of persecution and paranoia, and shirked responsibilities.

38. Defendant O'Connor made all the above statements knowing that they were false and defamatory and intending that they would injure Plaintiff.

39. Defendant O'Connor's written statement was communicated inter alia Major Dean Rueckert and others at the Kirk Mental Hygiene Clinic at Aberdeen Proving Ground and to Daniel M. Baughman, her successor as Plaintiff's commanding officer.

40. Defendant O'Connor's statement was designed to and did injure Plaintiff Murphy and impaired him in his career with the Army.

41. Plaintiff discovered that this defamatory statement had been made on or about December 1988, when his Army attorney requested and received copies of the statement.

WHEREFORE, Plaintiff prays that the Court:

a. Enter judgment against Defendant for $100,000 in compensatory damages;

b. Enter judgment against Defendant for $1,000,000 in punitive damages; and

c. Award Plaintiff the costs of this cation and such other relief as Plaintiff's cause requires.

COUNT IV
(Defamation as to Defendant Baughman)

42. The Plaintiff realleges, as if they had been made in full herein, the allegations set forth in Paragraphs Nos. 1 through 24, inclusive.

43. On September 6, 1988, Defendant Baughman signed the defamatory statement authored by Defendant O'Connor.

44. Defendant Baughman adopted the defamatory statement authored by O'Connor either knowing that they were

false and defamatory and intending that they would injure Plaintiff, or acting with reckless disregard for their truth or falsehood.

45. Said written statement was communicated to Major Dean Rueckert and others at the Kirk Mental Hygiene Clinic at Aberdeen Proving Ground.

46. Said statement was designed to and did injure Plaintiff Murphy and impaired him in his career with the Army.

47. Plaintiff discovered that this defamatory statement had been made on or about December 1988, when his Army attorney requested and received copies of the statement.

48. On or about September 6, 1988, Defendant Baughman signed off on a statement in an NCO Evaluation Report that relieved Plaintiff of his duty position as an intelligence sergeant in

the Army. That statement falsely stated that Plaintiff demonstrated disloyalty and was unworthy of promotion or schooling at this time, all of which was false and defamatory.

49. Said written statement was communicated to Plaintiff's superiors, Carl Lambert and Thomas Makin, and was placed in Plaintiff's Army personnel file where it is available to other third persons.

50. Defendant Baughman signed and adopted the defamatory statement either knowing that they were false and defamatory and intending that they would injure Plaintiff, or acting with reckless disregard for their truth or falsehood.

51. Said statement was designed to and did injure Plaintiff Murphy and impaired him in his career with the Army.

52. Plaintiff discovered that these defamatory statements had been made on or about September 6, 1988, when he was shown them and asked to sign the NCO Evaluation Report to which they were attached.

WHEREFORE, Plaintiff prays that the Court:

a. Enter judgment against Defendant for $100,000 in compensatory damages;

b. Enter judgment against Defendant for $1,000,000 in punitive damages; and

c. Award Plaintiff the costs of this action and such other relief as Plaintiff's cause requires.

COUNT VI
(Defamation as to Defendant Rueckert)

53. The Plaintiff realleges, as if they had been made in full herein, the allegations set forth in Paragraphs Nos. 1 through 24, inclusive.

54. On or about September 7, 1988, Defendant Rueckert authored a record of medical care concerning Plaintiff.

55. In that statement, Rueckert falsely stated that Plaintiff had passive-aggressive traits and had an occupational problem.

56. Defendant Rueckert made these statements knowing that they were false and defamatory and intending that they would injure Plaintiff.

57. Defendant Rueckert's statement was communicated inter alia to the Central Personnel Security Clearance Facility at Fort Meade where they were read by third persons.

58. Defendant Rueckert's statement was designed to and did injure Plaintiff Murphy and impaired him in his career with the Army.

59. Plaintiff discovered that this defamatory statement had been made on or about December, 1988, when his Army attorney requested and received copies of the statement.

WHEREFORE, Plaintiff prays that the Court:

a. Enter judgment against Defendant for $100,000 in compensatory damages;

b. Enter judgment against Defendant for $1,000,000 in punitive damages; and

c. Award Plaintiff the costs of this action and such other relief as Plaintiff's cause requires.

Respectfully submitted,

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Attorney for Plaintiff

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all issues triable before a jury.

_____

John H. Morris, Jr.

(2)

No. 91-1314

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM T. MURPHY, PETITIONER

v.

PHILIP C. MARCUM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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17

QUESTION PRESENTED

Whether the court of appeals correctly held that the *Feres* doctrine bars petitioner's lawsuit against his former superior officers for disciplinary action they took against him while he was on active military duty, allegedly in retaliation for his having written to a member of Congress.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

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v.

PHILIP C. MARCUM, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A17) is unreported. The decision of the district court (Pet. App. A18-A30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1991. The petition for a writ of certiorari was filed on January 16, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns petitioner William Murphy's claim that, while he was on active duty in the United States Army, he was wrongfully disciplined by his superior officers.

1. In May of 1988, petitioner was a staff sergeant at the Aberdeen Proving Grounds in Maryland. Petitioner possessed a top secret security clearance and worked in military intelligence. A white female private, Melissa Unkenholt, told petitioner that respondent Captain Sheila O'Connor, petitioner's immediate commanding officer, had telephoned Unkenholt's parents on two occasions to express reservations about Unkenholt's plans to marry a black man. Petitioner was disturbed by this allegation and drafted a petition denouncing O'Connor's actions. He intended to circulate the petition among the troops and to present it to the post's Equal Opportunity Office for investigation, although valid military regulations prohibited the circulation of such petitions. See *Brown* v. *Glines*, 444 U.S. 348 (1980).

On May 20, 1988, Group Sergeant Major Chester Leeth assembled the noncommissioned officers in petitioner's company and told them that he regarded the petition as mutinous. Pet. App. A38. A short time later, respondent Lieutenant Colonel Philip Marcum, the group commander, ordered a full investigation of the circumstances surrounding the petition. *Id.* at A39. As a result of the investigation, Marcum reprimanded petitioner on August 3, 1988, for making false accusations of racism against O'Connor. *Ibid.* Marcum told petitioner that, absent further problems involving petitioner, the reprimand would conclude the matter. *Ibid.* Petitioner then went on leave for a period of 30 days. *Id.* at A40.

Sometime before petitioner went on leave, he had initiated an Inspector General investigation and a congressional inquiry concerning a separate, unrelated matter in Marcum's chain of command. Pet. App. A40. Marcum learned of these inquiries when the Department of the Army consulted him in the preparation of the Army's response to a letter from the office of petitioner's United States Senator. At that time, petitioner was still on his 30-day leave in August. *Ibid.*

When petitioner returned from leave on September 6, 1988, he learned that Marcum had relieved him of his duty assignment and had suspended his security clearance. Pet. App. A42. Marcum informed petitioner that he was recommending revocation of petitioner's security clearance. *Ibid.* Respondent Captain Daniel M. Baughman, who had succeeded O'Connor as petitioner's immediate superior officer during petitioner's absence, referred petitioner for a mental evaluation. *Id.* at A43. Pursuant to Baughman's referral, respondent Major Dean M. Rueckert, Chief of Community Health Services at Aberdeen, evaluated petitioner and diagnosed him as suffering from "an '[o]ccupational [p]roblem with passive aggressive traits.'" *Id.* at A44. Rueckert's report was sent to Army authorities for use in evaluating the suspension of petitioner's security clearance. *Ibid.*

In the spring of 1989, petitioner was given orders transferring him to Korea. Pet. App. A45. When petitioner inquired about the status of his security clearance, he was given the option of going to Korea without resolving the matter or resigning. *Ibid.* Petitioner chose to resign. *Id.* at A46.

2. Petitioner instituted this action in district court against respondents Marcum, O'Connor, Baughman

and Rueckert in their individual capacities, asserting a state law claim of defamation and two damages claims for constitutional torts under *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The amended complaint asserts that respondents conspired to "force his resignation" in violation of his rights under the Fifth Amendment and to "retaliate against him for petitioning to his elected representatives" in violation of his First Amendment rights. Pet. App. A47.

Respondents moved to substitute the United States as the party defendant and to dismiss the complaint for failure to state a claim. Accepting the allegations of the amended complaint as true for purposes of the motion, the district court substituted the United States and granted the motion to dismiss, holding that "neither [petitioner's] defamation claim nor his constitutional claim are legally cognizable in this action." Pet. App. A24. Under this Court's decisions in *Feres* v. *United States*, 340 U.S. 135, 146 (1950), and *United States* v. *Stanley*, 483 U.S. 669, 684 (1987), the district court explained, "the sole question presented here is whether the injuries which [petitioner] claims [to have suffered] were 'incident to military service.'" Pet. App. A25. It held that they were: "The very gist of [petitioner's] complaint," the court concluded, "is that he was wrongfully disciplined." *Id.* at A28. Because resolution of petitioner's claims on the merits would necessarily require it to "second-guess military decisions," the district court held that dismissal of petitioner's complaint was required. *Id.* at A28, A30.

3. The court of appeals affirmed. Pet. App. A4-A17. It held, in accord with *Feres* and its progeny, that the United States is not liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, and

that superior officers are not liable under *Bivens*, 403 U.S. 388, "for injury to service personnel where the injuries arise out of or are in the course of activity incident to service." Pet. App. A12. The court also rejected petitioner's argument that respondents' actions interfered with his right to communicate with a member of Congress as provided for in former Section 1034 of 10 U.S.C. (1982), stating:

> Section 1034 provides that a service person may write a member of Congress without sending the communication through official channels. This right was not interfered with. He wrote his letter without sending it through official channels.

Pet. App. A14-A15. Concluding that "[t]he facts of this case as alleged by [petitioner] bring it clearly within the *Feres* doctrine," the court of appeals affirmed the judgment of the district court. *Id.* at A17.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any court of appeals. As the Fourth Circuit observed below, this case requires only the application of clear principles that have been "restated and [re]affirmed numerous times" by this Court and the courts of appeals. Pet. App. A12. Further review is therefore unwarranted.

1. In *Feres* v. *United States*, 340 U.S. 135, 146 (1950), this Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. *Chappell* v. *Wallace*, 462 U.S. 296, 305 (1983), extended that holding to bar recovery for constitutional torts under *Bivens* v. *Six Unknown*

Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), reasoning that the military's unique disciplinary structure, coupled with Congress' provision of a "comprehensive internal system of justice * * * for the review and remedy of complaints and grievances such as those presented by [enlisted men]," constituted " 'special factors' which dictate[d] that it would be inappropriate to provide enlisted military personnel a *Bivens*-type remedy against their superior officers." *Chappell*, 462 U.S. at 302, 304 (citing *Bush* v. *Lucas*, 462 U.S. 367, 378 (1983)). The military, it concluded, must be permitted "to deal with its own personnel" because "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have." *Chappell*, 462 U.S. at 305 (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)). This Court subsequently "reaffirm[ed]" that conclusion and reasoning in *United States* v. *Stanley*, 483 U.S. 669, 683-684 (1987), holding once again that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.' " *Id.* at 684 (quoting *Feres*, 340 U.S. at 146).

There can be no doubt that the injury petitioner alleges here in fact "ar[o]se out of" and was inflicted "in the course of activity incident to service." *Feres*, 340 U.S. at 146. As the district court pointed out, "[t]he very gist of [petitioner's] complaint is that he was wrongfully disciplined." Pet. App. A28. It goes without saying that military discipline is an integral part of, arises out of, and is incident to military service; in fact, it lies at the heart of the *Feres* doctrine. As this Court has explained, the *Feres* doctrine prevents the courts from interfering with mili-

tary discipline and the "peculiar and special relationship of the soldier to his superiors." *United States* v. *Muniz*, 374 U.S. 150, 162 (1963) (quoting *United States* v. *Brown* 348 U.S. 110, 112 (1954)). Because petitioner's suit asks the courts to interfere in that relationship by second-guessing disciplinary actions, the decisions below declining to entertain the suit were undeniably correct.[1]

2. Petitioner cites two court of appeals decisions that he claims are in conflict with the decision below. Pet. 28-31. Both decisions are, in fact, entirely consistent with the Fourth Circuit's decision in this case.

In *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985), several noncommissioned officers subjected a black soldier to a mock lynching at an off-duty party; the victim later became so depressed that he attempted suicide. His conservator brought a suit against the United States, the soldiers who participated in the lynching, and the commanding officer for civil rights violations. While

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[1] There are other procedures for dealing with improper discipline. Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938, provides:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

Thus, petitioner was not without a remedy; he just failed to invoke it.

upholding the dismissal of the FTCA and constitutional tort claims against the United States and the superior officers as barred by *Feres*, the Eighth Circuit held that the individual soldiers who participated in the incident were subject to suit: Reasoning that "the preservation of military discipline is at the heart of the *Feres* doctrine," 739 F.2d at 368, the court stated that "[t]he activity that is at issue in this claim is of a distinctly non-military nature: the alleged participation of a group of men at a holiday weekend drinking party in the mock lynching of a young black man." *Id.* at 369. In contrast, the act petitioner complains of here—being disciplined by a superior officer—is uniquely military in nature. In fact, the *Brown* court expressly so recognized: Under the *Feres* doctrine, the court explained, the judiciary may not "second-guess the military decisions as to how an investigation into a disciplinary matter should have been conducted." *Ibid.* Petitioner here seeks precisely the type of judicial "second-guessing" that the *Brown* court recognized as prohibited.

Nor is the decision below inconsistent with the Tenth Circuit's decision in *Durant* v. *Neneman*, 884 F.2d 1350 (1989), cert. denied, 493 U.S. 1024 (1990). In *Durant*, a service member driving his personal vehicle struck and injured two other service members on a military base while driving to his duty station. In holding that plaintiffs' negligence actions against the driver were not barred by *Feres*, the Tenth Circuit held that the soldier's mere act of driving to his duty station was not a "military act" that would implicate the function or authority of the military. 884 F.2d at 1353-1354. But *Durant* does not even remotely suggest that disciplining an allegedly mutinous officer such as petitioner is not a

"military act" implicating military authority. On the contrary, the *Durant* court explained that "civilian courts have a legitimate concern for protecting the harmony of the military establishment to prevent an erosion of discipline." *Id.* at 1354. Clearly, "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel * * * would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 1353 (quoting *Chappel*, 462 U.S. at 304). Accordingly, the appeals court ruling below does not conflict with *Durant*, either.

3. Petitioner seeks to avoid clear Supreme Court precedent and consistent circuit authority by arguing that a federal statute, former 10 U.S.C. 1034 (1982), takes his complaint outside the *Feres* doctrine. See Pet. 23-24. Specifically, petitioner contends that the discipline he received was, in law, not "incident to service" because his superiors violated 10 U.S.C. 1034 by imposing it in retaliation for his communication with a member of Congress. Neither 10 U.S.C. 1034 nor reason supports petitioner's argument.

a. At the time the events in this case took place, 10 U.S.C. 1034 (1982) provided:

> No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States.

Congress enacted former Section 1034 "to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels." *Brown* v. *Glines*, 444 U.S. 348, 359 (1980). But

nothing in Section 1034 indicates a congressional intent to create a judicial remedy where, under the *Feres* doctrine, none would otherwise exist. Section 1034 does not mention damages awards. Nor does it state that military discipline is reviewable in federal court. And nowhere does it state that discipline allegedly imposed in violation of its directives is "deemed" not "incident to service." On the contrary, as this Court pointed out in *Stanley*, statutes such as Section 1034 are "designed to halt or prevent the constitutional violation[s] rather than [to permit] the award of money damages" after they occur. 483 U.S. at 683. Section 1034 therefore provides no support for petitioner's arguments.

Indeed, petitioner's argument proves far too much. If petitioner's argument were correct, any military act allegedly committed in violation of federal law would cease to be "incident to service." But that is not the law. Instead, even injuries imposed as a result of clearly unconstitutional conduct—acts undertaken in violation of the *supreme* law of the land—can produce "injuries incident to service" that are non-compensable under *Feres*. See, *e.g.*, *Stanley*, 483 U.S. at 669; *Chappell* v. *Wallace*, 462 U.S. at 296. If an action's unconstitutionality does not take it outside the *Feres* doctrine, a fortiori its mere illegality will not either; instead, there must also be an indication that Congress intended to create a damages remedy. As explained above, there is no evidence of such an intent here.

b. But even if petitioner's interpretation of Section 1034 were arguable—which it is not—the issue would still not warrant review by this Court. Section 1034 was amended in 1988 to provide a comprehensive remedial scheme for incidents of retaliation

like that alleged by petitioner here. See 10 U.S.C. 1034(b)-(e) (1988). Whatever the circumstances before the 1988 amendment, it is now clear that the statute's administrative scheme, not a *Bivens*-type action in federal court, is the proper remedy for the type of wrong petitioner alleges. *Schweiker* v. *Chilicky*, 487 U.S. 412, 423-429 (1988) (no *Bivens* remedy where the "design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms."). Because the prior version of Section 1034 is unlikely to be at issue in many future cases, this Court's consideration of its interplay with the *Feres* doctrine is unwarranted.

4. Finally, petitioner argues that this Court should grant certiorari "to determine for the lower federal courts when, if at all, Congress may, by its own enactments, counter and undermine any judicial imputation of its intent to confer upon constitutional tort-feasors in the military an immunity from suit by the soldiers subject to injury." Pet. 44. But the issue of how Congress may override the *Feres* doctrine is not presented by this case: As explained above, Section 1034 does not represent an attempt to do so; it does not evidence an intent to create a damages remedy that would otherwise be barred by *Feres*.

In any event, if the issue were presented here, further review would still be unnecessary because this Court has already offered sufficient guidance. In *Stanley*, this Court explained:

> Today, no more than when we wrote *Chappell*, do we see any reason why our judgment in the *Bivens* context should be any less protective of military concerns than it has been with respect to FTCA suits, where we adopted an "incident

> to service" rule. In fact, if anything we might have felt freer to compromise military concerns in the latter context, since we were confronted with an explicit congressional authorization for judicial involvement that was, on its face, unqualified; whereas here we are confronted with an explicit constitutional authorization for *Congress* "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. Const., Art. I, § 8, cl. 14, and rely upon inference for our own authority to allow money damages.

483 U.S. at 681-682 (footnote omitted). Thus, it is clear that Congress may overrule *Feres* and *Chappell* by "mak[ing] Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, which provide damages remedies to compensate service members for service-related injuries. It simply has chosen not to do so. This Court decided *Chappell* nearly a decade ago, and *Feres* more than three decades before that. Surely, if Congress had intended superior officers to be subject to damages suits by their subordinates for constitutional torts, it would have acted by now to correct this Court's misapprehension. Cf. *Feres*, 340 U.S. at 138 (Congress "possesses a ready remedy" to correct the Court's interpretation of the FTCA).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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